

§ 229.601

17 CFR Ch. II (4–1–02 Edition)

Act (§230.461 of this chapter), or if the registration statement is filed on Form S-8, and:

(1) Any provision or arrangement exists whereby the registrant may indemnify a director, officer or controlling person of the registrant against liabilities arising under the Securities Act, or

(2) The underwriting agreement contains a provision whereby the registrant indemnifies the underwriter or controlling persons of the underwriter against such liabilities and a director, officer or controlling person of the registrant is such an underwriter or controlling person thereof or a member of any firm which is such an underwriter, and

(3) The benefits of such indemnification are not waived by such persons:

Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.

(i) Include the following in a registration statement permitted by Rule 430A under the Securities Act of 1933 (§230.430A of this chapter):

The undersigned registrant hereby undertakes that:

(1) For purposes of determining any liability under the Securities Act of 1933, the information omitted from the form of prospectus filed as part of this registration statement in reliance upon Rule 430A and contained in a form of prospectus filed by the registrant pursuant to Rule 424(b) (1) or (4) or 497(h) under the Securities Act shall be

deemed to be part of this registration statement as of the time it was declared effective.

(2) For the purpose of determining any liability under the Securities Act of 1933, each post-effective amendment that contains a form of prospectus shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(j) *Qualification of trust indentures under the Trust Indenture Act of 1939 for delayed offerings.* Include the following if the registrant intends to rely on section 305(b)(2) of the Trust Indenture Act of 1939 for determining the eligibility of the trustee under indentures for securities to be issued, offered, or sold on a delayed basis by or on behalf of the registrant:

The undersigned registrant hereby undertakes to file an application for the purpose of determining the eligibility of the trustee to act under subsection (a) of section 310 of the Trust Indenture Act (“Act”) in accordance with the rules and regulations prescribed by the Commission under section 305(b)(2) of the Act.

[47 FR 11401, Mar. 16, 1982, as amended at 47 FR 39803, Sept. 10, 1982; 47 FR 54769, Dec. 6, 1982; 50 FR 18999, May 6, 1985; 52 FR 21260, June 5, 1987; 52 FR 21939, June 10, 1987; 52 FR 30145, Aug. 13, 1987; 55 FR 23922, June 13, 1990; 56 FR 22319, May 15, 1991; 58 FR 60306, Nov. 15, 1993; 59 FR 21649, Apr. 26, 1994; 60 FR 26615, May 17, 1995; 64 FR 53909, Oct. 5, 1999]

Subpart 229.600—Exhibits

§ 229.601 (Item 601) Exhibits.

(a) *Exhibits and index required.* (1) Subject to Rule 411(c) (§230.411(c) of this chapter) under the Securities Act and Rule 12b-32 (§240.12b-32 of this chapter) under the Exchange Act regarding incorporation of exhibits by reference, the exhibits required in the exhibit table shall be filed as indicated, as part of the registration statement or report. Financial Data Schedules required by paragraph (b)(27) of this Item shall be submitted pursuant to the provisions of paragraph (c) of this Item. Notwithstanding the provisions of paragraphs (b)(27) and (c) of this Item, registered investment companies and business development companies filing on forms available solely to investment companies shall be subject to the

provisions of rule 483 under the Securities Act of 1933 (§230.483 of this chapter), and any provision or instruction therein shall be controlling with respect to registered investment companies and business development companies unless otherwise specifically provided in rules or instructions pertaining to the submission of a specific form.

(2) Each registration statement or report shall contain an exhibit index, which shall precede immediately the exhibits filed with such registration statement. For convenient reference, each exhibit shall be listed in the exhibit index according to the number assigned to it in the exhibit table. The exhibit index shall indicate, by handwritten, typed, printed, or other legible form of notation in the manually signed original registration statement or report, the page number in the sequential numbering system where such exhibit can be found. Where exhibits are incorporated by reference, this fact shall be noted in the exhibit index referred to in the preceding sentence. Further, the first page of the manually signed registration statement shall list the page in the filing where the exhibit index is located. For a description of each of the exhibits included in the exhibit table, see paragraph (b) of this section.

(3) This Item applies only to the forms specified in the exhibit table. With regard to forms not listed in that table, reference shall be made to the appropriate form for the specific exhibit filing requirements applicable thereto.

(4) If a material contract or plan of acquisition, reorganization, arrangement, liquidation or succession is executed or becomes effective during the reporting period reflected by a Form 10-Q and Form 10-QSB or Form 10-K and Form 10-KSB, it shall be filed as an exhibit to the Form 10-Q and Form 10-QSB or Form 10-K and Form 10-KSB filed for the corresponding period. Any amendment or modification to a previously filed exhibit to a Form 10 and Form 10-SB, 10-K or 10-Q document shall be filed as an exhibit to a Form 10-Q and Form 10-QSB or Form 10-K and Form 10-KSB. Such amendment or modification need not be filed where

such previously filed exhibit would not be currently required.

Instructions to Item 601: 1. If an exhibit to a registration statement (other than an opinion or consent), filed in preliminary form, has been changed only (A) to insert information as to interest, dividend or conversion rates, redemption or conversion prices, purchase or offering prices, underwriters' or dealers' commissions, names, addresses or participation of underwriters or similar matters, which information appears elsewhere in an amendment to the registration statement or a prospectus filed pursuant to Rule 424(b) under the Securities Act (§230.424(b) of this chapter), or (B) to correct typographical errors, insert signatures or make other similar immaterial changes, then, notwithstanding any contrary requirement of any rule or form, the registrant need not refile such exhibit as so amended. Any such incomplete exhibit may not, however, be incorporated by reference in any subsequent filing under any Act administered by the Commission.

2. In any case where two or more indentures, contracts, franchises, or other documents required to be filed as exhibits are substantially identical in all material respects except as to the parties thereto, the dates of execution, or other details, the registrant need file a copy of only one of such documents, with a schedule identifying the other documents omitted and setting forth the material details in which such documents differ from the document a copy of which is filed. The Commission may at any time in its discretion require filing of copies of any documents so omitted.

3. Only copies, rather than originals, need be filed of each exhibit required except as otherwise specifically noted.

4. *Electronic filings.* Whenever an exhibit is filed in paper pursuant to a hardship exemption (§§232.201 and 232.202 of this chapter), the letter "P" (paper) shall be placed next to the exhibit in the list of exhibits required by Item 601(a)(2) of this Rule. Whenever an electronic confirming copy of an exhibit is filed pursuant to a hardship exemption (§232.201 or §232.202(d) of this chapter), the exhibit index should specify where the confirming electronic copy can be located; in addition, the designation "CE" (confirming electronic) should be placed next to the listed exhibit in the exhibit index.

EXHIBIT TABLE

Instructions to the Exhibit Table

1. The exhibit table indicates those documents that must be filed as exhibits to the respective forms listed.

2. The "X" designation indicates the documents which are required to be filed with each form even if filed previously with another document, *Provided, However*, that such

§ 229.601

17 CFR Ch. II (4-1-02 Edition)

previously filed documents may be incorporated by reference to satisfy the filing requirements.

3. The number used in the far left column of the table refers to the appropriate sub-

section in paragraph (b) where a description of the exhibit can be found. Whenever necessary, alphabetical or numerical subparts may be used.

EXHIBIT TABLE														
	Securities Act Forms										Exchange Act Forms			
	S-1	S-2	S-3	S-4 ³	S-8	S-11	F-1	F-2	F-3	F-4 ³	10	8-K	10-Q	10-K
(1) Underwriting agreement	X	X	X	X	----	X	X	X	X	X	----	X	----	----
(2) Plan of acquisition, reorganization, arrangement, liquidation, or succession	X	X	X	X	----	X	X	X	X	X	X	X	X	X
(3) (i) Articles of incorporation	X	----	----	X	----	X	X	----	----	X	X	----	X	X
(ii) By-laws	X	----	----	X	----	X	X	----	----	X	X	----	X	X
(4) Instruments defining the rights of security holders, including indentures	X	X	X	X	X	X	X	X	X	X	X	X	X	X
(5) Opinion re legality	X	X	X	X	X	X	X	X	X	X	----	----	----	----
(6) Reserved	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(7) Reserved	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(8) Opinion re tax matters	X	X	X	X	----	X	X	X	X	X	----	----	----	----
(9) Voting trust agreement	X	----	----	X	----	X	X	----	----	X	X	----	----	X
(10) Material contracts	X	X	----	X	----	X	X	X	----	X	X	----	X	X
(11) Statement re computation of per share earnings	X	X	----	X	----	X	X	X	----	X	X	----	X	X
(12) Statements re computation of ratios	X	X	X	X	----	X	X	X	----	X	X	----	----	X
(13) Annual report to security holders, Form 10-Q or quarterly report to security holders	----	X	----	X	----	----	----	----	----	----	----	----	----	X
(14) Reserved	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(15) Letter re unaudited interim financial information	X	X	X	X	X	X	X	X	X	X	----	----	X	----
(16) Letter re change in certifying accountant ⁴	X	X	----	X	----	X	----	----	----	----	X	X	----	X
(17) Letter re director resignation	----	----	----	----	----	----	----	----	----	----	----	X	----	----
(18) Letter re change in accounting principles	----	----	----	----	----	----	----	----	----	----	----	----	X	X
(19) Report furnished to security holders	----	----	----	----	----	----	----	----	----	----	----	----	X	----
(20) Other documents or statements to security holders	----	----	----	----	----	----	----	----	----	----	----	X	----	----
(21) Subsidiaries of the registrant	X	----	----	X	----	X	X	----	----	X	X	----	----	X
(22) Published report regarding matters submitted to vote of security holders	----	----	----	----	----	----	----	----	----	----	----	----	X	X
(23) Consent of experts and counsel	X	X	X	X	X	X	X	X	X	X	----	X ²	X ²	X ²
(24) Power of attorney	X	X	X	X	X	X	X	X	X	X	X	X	X	X
(25) Statement of eligibility of trustee	X	X	X	X	----	X	X	X	X	X	----	----	----	----
(26) Invitations for competitive bids	X	X	X	X	----	----	X	X	X	X	----	----	----	----
(27) Financial Data Schedule ⁵	X	X	X	X	----	X	----	----	----	----	X	X	X	X
(28) Reserved	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(29) through (98) [Reserved]	X	X	X	X	X	X	X	X	X	X	X	X	X	X
(99) Additional Exhibits	X	X	X	X	X	X	X	X	X	X	X	X	X	X

¹ Where incorporated by reference into the text of the prospectus and delivered to security holders along with the prospectus as permitted by the registration statement; or, in the case of the Form 10-K, where the annual report to security holders is incorporated by reference into the text of the Form 10-K.

² Where the opinion of the expert or counsel has been incorporated by reference into a previously filed Securities Act registration statement.

³ An exhibit need not be provided about a company if: (1) With respect to such company an election has been made under Forms S-4 or F-4 to provide information about such company at a level prescribed by Forms S-2, S-3, F-2 or F-3 and (2) the form, the level of which has been elected under Forms S-4 or F-4, would not require such company to provide such exhibit if it were registering a primary offering.

⁴ If required pursuant to Item 304 of Regulation S-K.

⁵ Financial Data Schedules shall be filed by electronic filers only. Such schedule shall be filed only when a filing includes annual and/or interim financial statements that have not been previously included in a filing with the Commission. See Item 601(c) of Regulation S-K.

(b) *Description of exhibits.* Set forth below is a description of each document listed in the exhibit tables.

(1) *Underwriting agreement.* Each underwriting contract or agreement with a principal underwriter pursuant to which the securities being registered are to be distributed; if the terms of such documents have not been determined, the proposed forms thereof. Such agreement may be filed as an exhibit to a report on Form 8-K (§ 249.308 of this chapter) which is incorporated by reference into a registration statement subsequent to its effectiveness.

(2) *Plan of acquisition, reorganization, arrangement, liquidation or succession.* Any material plan of acquisition, disposition, reorganization, readjustment, succession, liquidation or arrangement and any amendments thereto described in the statement or report. Schedules (or similar attachments) to these exhibits shall not be filed unless such schedules contain information which is material to an investment decision and which is not otherwise disclosed in the agreement or the disclosure document. The plan filed shall contain a list briefly identifying the contents of all omitted schedules, together with an agreement to furnish supplementally a copy of any omitted schedule to the Commission upon request.

(3)(i) *Articles of incorporation.* The articles of incorporation of the registrant or instruments corresponding thereto as currently in effect and any amendments thereto. Whenever amendments to articles of incorporation are filed, a complete copy of the articles as amended shall be filed. Where it is impracticable for the registrant to file a charter amendment authorizing new securities with the appropriate state authority prior to the effective date of the registration statement registering such securities, the registrant may file as an exhibit to the registration statement the form of amendment to be filed with the state authority; and in such a case, if material changes are made after the copy is filed, the registrant must also file the changed copy.

(ii) *By-laws.* The by-laws of the registrant or instruments corresponding thereto as currently in effect and any amendments thereto. Whenever amend-

ments to the by-laws are filed, a complete copy of the by-laws as amended shall be filed.

(4) *Instruments defining the rights of security holders, including indentures.* (i) All instruments defining the rights of holders of the equity or debt securities being registered including, where applicable, the relevant portion of the articles of incorporation or by-laws of the registrant.

(ii) Except as set forth in paragraph (b)(4)(iii) of this section for filings on Forms S-1, S-4, S-11, S-14 and F-4 under the Securities Act (§§ 239.1, and 25, 18, 23 and 34 of this chapter) and Forms 10 and Form 10-SB and 10-K and Form 10-KSB (§§ 249.210 and 310 of this chapter) under the Exchange Act all instruments defining the rights of holders of long-term debt of the registrant and its consolidated subsidiaries and for any of its unconsolidated subsidiaries for which financial statements are required to be filed.

(iii) Where the instrument defines the rights of holders of long-term debt of the registrant and its consolidated subsidiaries and for any of its unconsolidated subsidiaries for which financial statements are required to be filed, there need not be filed:

(A) Any instrument with respect to long-term debt not being registered if the total amount of securities authorized thereunder does not exceed 10 percent of the total assets of the registrant and its subsidiaries on a consolidated basis and if there is filed an agreement to furnish a copy of such agreement to the Commission upon request;

(B) Any instrument with respect to any class of securities if appropriate steps to assure the redemption or retirement of such class will be taken prior to or upon delivery by the registrant of the securities being registered; or

(C) Copies of instruments evidencing scrip certificates for fractions of shares.

(iv) If any of the securities being registered are, or will be, issued under an indenture to be qualified under the Trust Indenture Act, the copy of such indenture which is filed as an exhibit shall include or be accompanied by:

(A) A reasonably itemized and informative table of contents; and

(B) A cross-reference sheet showing the location in the indenture of the provisions inserted pursuant to sections 310 through 318(a) inclusive of the Trust Indenture Act of 1939.

(v) With respect to Forms 8-K and 10-Q and 10-QSB under the Exchange Act which are filed and which disclose, in the text of the Form 10-Q and Form 10-QSB, the interim financial statements, or the footnotes thereto the creation of a new class of securities or indebtedness or the modification of existing rights of security holders, file all instruments defining the rights of holders of these securities or indebtedness. However, there need not be filed any instrument with respect to long-term debt not being registered which meets the exclusion set forth above in paragraph (b)(4)(iii)(A).

Instruction 1 to paragraph (b)(4): There need not be filed any instrument which defines the rights of participants (not as security holders) pursuant to an employee benefit plan.

Instruction 2 to paragraph (b)(4) (for electronic filings): If the instrument defining the rights of security holders is in the form of a certificate, the text appearing on the certificate shall be reproduced in an electronic filing together with a description of any other graphic and image material appearing on the certificate, as provided in Rule 304 of Regulation S-T (§232.304 of this chapter).

(5) *Opinion re legality.* (i) An opinion of counsel as to the legality of the securities being registered, indicating whether they will, when sold, be legally issued, fully paid and non-assessable, and, if debt securities, whether they will be binding obligations of the registrant.

(ii) If the securities being registered are issued under a plan and the plan is subject to the requirements of ERISA furnish either:

(A) An opinion of counsel which confirms compliance of the provisions of the written documents constituting the plan with the requirements of ERISA pertaining to such provisions; or

(B) A copy of the Internal Revenue Service determination letter that the plan is qualified under section 401 of the Internal Revenue Code; or

(iii) If the securities being registered are issued under a plan which is subject to the requirements of ERISA and the plan has been amended subsequent to the filing of paragraph (b)(5)(ii) (A) or (B) above, furnish either:

(A) An opinion of counsel which confirms compliance of the amended provisions of the plan with the requirements of ERISA pertaining to such provisions; or

(B) A copy of the Internal Revenue Service determination letter that the amended plan is qualified under section 401 of the Internal Revenue Code.

NOTE: Attention is directed to Item 8 of Form S-8 for exemptions to this exhibit requirement applicable to that Form.

(6)-(7) [Reserved]

(8) *Opinion re tax matters.* For filings on Form S-11 under the Securities Act (§239.18) or those to which Securities Act Industry Guide 5 applies, an opinion of counsel or of an independent public or certified public accountant or, in lieu thereof, a revenue ruling from the Internal Revenue Service, supporting the tax matters and consequences to the shareholders as described in the filing when such tax matters are material to the transaction for which the registration statement is being filed. This exhibit otherwise need only be filed with the other applicable registration forms where the tax consequences are material to an investor and a representation as to tax consequences is set forth in the filing. If a tax opinion is set forth in full in the filing, an indication that such is the case may be made in lieu of filing the otherwise required exhibit. Such tax opinions may be conditioned or may be qualified, so long as such conditions and qualifications are adequately described in the filing.

(9) *Voting trust agreement.* Any voting trust agreements and amendments thereto.

(10) *Material contracts.* (i) Every contract not made in the ordinary course of business which is material to the registrant and is to be performed in whole or in part at or after the filing of the registration statement or report or was entered into not more than two years before such filing. Only contracts need be filed as to which the registrant or subsidiary of the registrant is a

party or has succeeded to a party by assumption or assignment or in which the registrant or such subsidiary has a beneficial interest.

(ii) If the contract is such as ordinarily accompanies the kind of business conducted by the registrant and its subsidiaries, it will be deemed to have been made in the ordinary course of business and need not be filed unless it falls within one or more of the following categories, in which case it shall be filed except where immaterial in amount or significance:

(A) Any contract to which directors, officers, promoters, voting trustees, security holders named in the registration statement or report, or underwriters are parties other than contracts involving only the purchase or sale of current assets having a determinable market price, at such market price;

(B) Any contract upon which the registrant's business is substantially dependent, as in the case of continuing contracts to sell the major part of registrant's products or services or to purchase the major part of registrant's requirements of goods, services or raw materials or any franchise or license or other agreement to use a patent, formula, trade secret, process or trade name upon which registrant's business depends to a material extent;

(C) Any contract calling for the acquisition or sale of any property, plant or equipment for a consideration exceeding 15 percent of such fixed assets of the registrant on a consolidated basis; or

(D) Any material lease under which a part of the property described in the registration statement or report is held by the registrant.

(iii)(A) Any management contract or any compensatory plan, contract or arrangement, including but not limited to plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing (or if not set forth in any formal document, a written description thereof) in which any director or any of the named executive officers of the registrant, as defined by Item 402(a)(3) (§ 229.402(a)(3)), participates shall be deemed material and shall be filed; and any other manage-

ment contract or any other compensatory plan, contract, or arrangement in which any other executive officer of the registrant participates shall be filed unless immaterial in amount or significance.

(B) Any compensatory plan, contract or arrangement adopted without the approval of security holders pursuant to which equity may be awarded, including, but not limited to, options, warrants or rights (or if not set forth in any formal document, a written description thereof), in which any employee (whether or not an executive officer of the registrant) participates shall be filed unless immaterial in amount or significance. A compensation plan assumed by a registrant in connection with a merger, consolidation or other acquisition transaction pursuant to which the registrant may make further grants or awards of its equity securities shall be considered a compensation plan of the registrant for purposes of the preceding sentence.

(C) Notwithstanding paragraph (b)(10)(iii)(A) above, the following management contracts or compensatory plans, contracts or arrangements need not be filed:

(1) Ordinary purchase and sales agency agreements.

(2) Agreements with managers of stores in a chain organization or similar organization.

(3) Contracts providing for labor or salesmen's bonuses or payments to a class of security holders, as such.

(4) Any compensatory plan, contract or arrangement which pursuant to its terms is available to employees, officers or directors generally and which in operation provides for the same method of allocation of benefits between management and nonmanagement participants.

(5) Any compensatory plan, contract or arrangement if the registrant is a foreign private issuer that furnishes compensatory information on an aggregate basis as permitted by General Instruction 1 to Item 402 (§ 229.402) or by Item 6.B of Form 20-F (§ 249.220f of this chapter).

(6) Any compensatory plan, contract, or arrangement if the registrant is a wholly owned subsidiary of a company that has a class of securities registered

pursuant to section 12 or files reports pursuant to section 15(d) of the Exchange Act and is filing a report on Form 10-K and Form 10-KSB or registering debt instruments or preferred stock which are not voting securities on Form S-2.

Instruction 1 to paragraph (b)(10): With the exception of management contracts, in order to comply with paragraph (iii) above, registrants need only file copies of the various compensatory plans and need not file each individual director's or executive officer's personal agreement under the plans unless there are particular provisions in such personal agreements whose disclosure in an exhibit is necessary to an investor's understanding of that individual's compensation under the plan.

Instruction 2 to paragraph (b)(10): If a material contract is executed or becomes effective during the reporting period reflected by a Form 10-Q or Form 10-K, it shall be filed as an exhibit to the Form 10-Q or Form 10-K filed for the corresponding period. See paragraph (a)(4) of this Item. With respect to quarterly reports on Form 10-Q, only those contracts executed or becoming effective during the most recent period reflected in the report shall be filed.

(11) *Statement re computation of per share earnings.* A statement setting forth in reasonable detail the computation of per share earnings, unless the computation can be clearly determined from the material contained in the registration statement or report. The information with respect to the computation of per share earnings on both primary and fully diluted basis, presented by exhibit or otherwise, must be furnished even though the amounts of per share earnings on the fully diluted bases are not required to be presented in the income statement under the provisions of Accounting Principles Board Opinion No. 15. That Opinion provides that any reduction of less than 3% need not be considered as dilution (see footnote to paragraph 14 of the Opinion) and that a computation on the fully diluted basis which results in improvement of earnings per share not be taken into account (see paragraph 40 of the Opinion).

(12) *Statements re computation of ratios.* A statement setting forth in reasonable detail the computation of any ratio of earnings to fixed charges, any ratio of earnings to combined fixed charges and preferred stock dividends

or any other ratios which appear in the registration statement or report. See Item 503(d) of Regulation S-K (§ 229.503(d)).

(13) *Annual report to security holders, Form 10-Q and Form 10-QSB or quarterly report to security holders.* (i) The registrant's annual report to security holders for its last fiscal year, its Form 10-Q and Form 10-QSB (if specifically incorporated by reference in the prospectus) or its quarterly report to security holders, if all or a portion thereof is incorporated by reference in the filing. Such report, except for those portions thereof which are expressly incorporated by reference in the filing, is to be furnished for the information of the Commission and is not to be deemed "filed" as part of the filing. If the financial statements in the report have been incorporated by reference in the filing, the accountant's certificate shall be manually signed in one copy. See Rule 411(b) (§ 230.411(b) of this chapter).

(ii) Electronic filings. If all, or any portion, of the annual or quarterly report to security holders is incorporated by reference into any electronic filing, all, or such portion of the annual or quarterly report to security holders so incorporated, shall be filed in electronic format as an exhibit to the filing.

(14) [Reserved]

(15) *Letter re unaudited interim financial information.* A letter, where applicable, from the independent accountant which acknowledges awareness of the use in a registration statement of a report on unaudited interim financial information which pursuant to Rule 436(c) under the Securities Act (§ 230.436(c) of this chapter) is not considered a part of a registration statement prepared or certified by an accountant or a report prepared or certified by an accountant within the meaning of sections 7 and 11 of that Act. Such letter may be filed with the registration statement, an amendment thereto, or a report on Form 10-Q and Form 10-QSB which is incorporated by reference into the registration statement.

(16) *Letter re change in certifying accountant.* A letter from the registrant's

former independent accountant regarding its concurrence or disagreement with the statements made by the registrant in the current report concerning the resignation or dismissal as the registrant's principal accountant.

(17) *Letter re director resignation.* Any letter from a former director which sets forth a description of a disagreement with the registrant that led to the director's resignation or refusal to stand for re-election and which requests that the matter be disclosed.

(18) *Letter re change in accounting principles.* Unless previously filed, a letter from the registrant's independent accountant indicating whether any change in accounting principles or practices followed by the registrant, or any change in the method of applying any such accounting principles or practices, which affected the financial statements being filed with the Commission in the report or which is reasonably certain to affect the financial statements of future fiscal years is to an alternative principle which in his judgment is preferable under the circumstances. No such letter need be filed when such change is made in response to a standard adopted by the Financial Accounting Standards Board that creates a new accounting principle, that expresses a preference for an accounting principle, or that rejects a specific accounting principle.

(19) *Report furnished to security holders.* If the registrant makes available to its stockholders or otherwise publishes, within the period prescribed for filing the report, a document or statement containing information meeting some or all of the requirements of Part I of Form 10-Q and Form 10-QSB, the information called for may be incorporated by reference to such published document or statement provided copies thereof are included as an exhibit to the registration statement or to Part I of the Form 10-Q and Form 10-QSB report.

(20) *Other documents or statements to security holders.* If the registrant makes available to its stockholders or otherwise publishes, within the period prescribed for filing the report, a document or statement containing information meeting some or all of the requirements of this form the information

called for may be incorporated by reference to such published document or statement provided copies thereof are filed as an exhibit to the report on this form.

(21) *Subsidiaries of the registrant.* (i) List all subsidiaries of the registrant, the state or other jurisdiction of incorporation or organization of each, and the names under which such subsidiaries do business. This list may be incorporated by reference from a document which includes a complete and accurate list.

(ii) The names of particular subsidiaries may be omitted if the unnamed subsidiaries, considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary as of the end of the year covered by this report. (See the definition of "significant subsidiary" in Rule 1-02(w) (17 CFR 210.1-02(w)) of Regulation S-X.) The names of consolidated wholly-owned multiple subsidiaries carrying on the same line of business, such as chain stores or small loan companies, may be omitted, provided the name of the immediate parent, the line of business, the number of omitted subsidiaries operating in the United States and the number operating in foreign countries are given. This instruction shall not apply, however, to banks, insurance companies, savings and loan associations or to any subsidiary subject to regulation by another Federal agency.

(22) *Published report regarding matters submitted to vote of security holders.* Published reports containing all of the information called for by Item 4 of Part II of Form 10-Q and Form 10-QSB or Item 4 of Part I of Form 10-K and Form 10-KSB which is referred to therein in lieu of providing disclosure in Form 10-Q and Form 10-QSB or 10-K and Form 10-KSB, which are required to be filed as exhibits by Rule 12b-23(a)(3) under the Exchange Act (§240.12b-23(a)(3) of this chapter).

(23) *Consents of experts and counsel—* (i) *Securities Act filings.* All written consents required to be filed shall be dated and manually signed. Where the consent of an expert or counsel is contained in his report or opinion or elsewhere in the registration statement or document filed therewith, a reference

shall be made in the index to the report, the part of the registration statement or document or opinion, containing the consent.

(ii) *Exchange Act reports.* Where the filing of a written consent is required with respect to material incorporated by reference in a previously filed registration statement under the Securities Act, such consent may be filed as exhibit to the material incorporated by reference. Such consents shall be dated and manually signed.

(24) *Power of attorney.* If any name is signed to the registration statement or report pursuant to a power of attorney, manually signed copies of such power of attorney shall be filed. Where the power of attorney is contained elsewhere in the registration statement or documents filed therewith a reference shall be made in the index to the part of the registration statement or document containing such power of attorney. In addition, if the name of any officer signing on behalf of the registrant is signed pursuant to a power of attorney, certified copies of a resolution of the registrant's board of directors authorizing such signature shall also be filed. A power of attorney that is filed with the Commission shall relate to a specific filing or an amendment thereto, provided, however, that a power of attorney relating to a registration statement under the Securities Act or an amendment thereto also may relate to any registration statement for the same offering that is to be effective upon filing pursuant to Rule 462(b) under the Securities Act (§ 230.462(b) of this chapter). A power of attorney that confers general authority shall not be filed with the Commission.

(25) *Statement of eligibility of trustee.* (i) A statement of eligibility and qualification of each person designated to act as trustee under an indenture to be qualified under the Trust Indenture Act of 1939. Such statement of eligibility shall be bound separately from the other exhibits.

(ii) *Electronic filings.* The requirement to bind separately the statement of eligibility and qualification of each person designated to act as a trustee under the Trust Indenture Act of 1939 from other exhibits shall not apply to statements submitted in electronic for-

mat. Rather, such statements must be submitted as exhibits in the same electronic submission as the registration statement to which they relate, or in an amendment thereto, except that electronic filers that rely on Trust Indenture Act Section 305(b)(2) for determining the eligibility of the trustee under indentures for securities to be issued, offered or sold on a delayed basis by or on behalf of the registrant shall file such statements separately in the manner prescribed by § 260.5b-1 through § 260.5b-3 of this chapter and by the EDGAR Filer Manual.

(26) *Invitations for competitive bids.* If the registration statement covers securities to be offered at competitive bidding, any form of communication which is an invitation for competitive bid which will be sent or given to any person shall be filed.

(27) through (98) [Reserved]

(99) *Additional exhibits.* (i) Any additional exhibits which the registrant may wish to file shall be so marked as to indicate clearly the subject matters to which they refer.

(ii) Any document (except for an exhibit) or part thereof which is incorporated by reference in the filing and is not otherwise required to be filed by this Item or is not a Commission filed document incorporated by reference in a Securities Act registration statement.

(iii) If pursuant to Section 11(a) of the Securities Act (15 U.S.C. 77k(a)) an issuer makes generally available to its security holders an earnings statement covering a period of at least 12 months beginning after the effective date of the registration statement, and if such earnings statement is made available by "other methods" than those specified in paragraphs (a) or (b) of § 230.158 of this chapter, it must be filed as an exhibit to the Form 10-Q or the Form 10-K, as appropriate, covering the period in which the earnings statement was released.

[47 FR 11401, Mar. 16, 1982]

EDITORIAL NOTE: 1. For FEDERAL REGISTER citations affecting § 229.601, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

2. At 65 FR 24799, Apr. 27, 2000, in § 229.601, paragraph (a), the table was amended by removing the entries for exhibits (27) and (28) and footnote 5, however, this is a photographed table, thus the entries could not be removed.

§ 229.601T (Item 601T) Item 601T of Regulation S-K.

Any issuer that may rely upon the alternative disclosure requirement of § 229.304T shall comply with § 229.601(b)(16) in the following manner:

(a) If Arthur Andersen LLP (or a foreign affiliate of Arthur Andersen LLP) has already provided the issuer with a letter addressed to the Commission stating whether it agrees or disagrees with the statements made by the issuer in response to § 229.304(c), the issuer must comply with § 229.601(b)(16).

(b) If Arthur Andersen LLP (or a foreign affiliate of Arthur Andersen LLP) has not provided the issuer with this letter and the issuer cannot obtain it after reasonable efforts, the issuer need not comply with § 229.601(b)(16).

(c) This temporary section will expire on December 31, 2002.

[67 FR 13536, Mar. 22, 2002]

EFFECTIVE DATE NOTE: At 67 FR 13536, Mar. 22, 2002, § 229.601T was added effective Mar. 18, 2002 through Dec. 31, 2002.

Subpart 229.700—Miscellaneous

§ 229.701 (Item 701) Recent sales of unregistered securities; use of proceeds from registered securities.

Furnish the following information as to all securities of the registrant sold by the registrant within the past three years which were not registered under the Securities Act. Include sales of reacquired securities, as well as new issues, securities issued in exchange for property, services, or other securities, and new securities resulting from the modification of outstanding securities.

(a) *Securities sold.* Give the date of sale and the title and amount of securities sold.

(b) *Underwriters and other purchasers.* Give the names of the principal underwriters, if any. As to any such securities not publicly offered, name the persons or identify the class of persons to whom the securities were sold.

(c) *Consideration.* As to securities sold for cash, state the aggregate offering price and the aggregate underwriting discounts or commissions. As to any securities sold otherwise than for cash, state the nature of the transaction and the nature and aggregate amount of consideration received by the registrant.

(d) *Exemption from registration claimed.* Indicate the section of the Securities Act or the rule of the Commission under which exemption from registration was claimed and state briefly the facts relied upon to make the exemption available.

(e) *Terms of conversion or exercise.* If the information called for by this paragraph (e) is being presented on Form 8-K, Form 10-QSB, Form 10-Q, Form 10-KSB or Form 10-K (§§ 249.308, 249.308b, 249.308a, 249.310b or 249.310) under the Exchange Act, and where the securities sold by the registrant are convertible or exchangeable into equity securities, or are warrants or options representing equity securities, disclose the terms of conversion or exercise of the securities.

(f) *Use of proceeds.* As required by § 230.463 of this chapter, following the effective date of the first registration statement filed under the Securities Act by an issuer, the issuer or successor issuer shall report the use of proceeds on its first periodic report filed pursuant to sections 13(a) and 15(d) of the Exchange Act (15 U.S.C. 78m(a) and 78o(d)) after effectiveness of its Securities Act registration statement, and thereafter on each of its subsequent periodic reports filed pursuant to sections 13(a) and 15(d) of the Exchange Act through the later of disclosure of the application of all the offering proceeds, or disclosure of the termination of the offering. If a report of the use of proceeds is required with respect to the first effective registration statement of the predecessor issuer, the successor issuer shall provide such a report. The information provided pursuant to paragraphs (f)(2) through (f)(4) of this Item need only be provided with respect to the first periodic report filed pursuant to sections 13(a) and 15(d) of the Exchange Act after effectiveness of the registration statement filed under the Securities Act. Subsequent periodic reports filed pursuant to sections 13(a)